

FILED & ENTERED

FEB 12 2016

CLERK U.S. BANKRUPTCY COURT
Central District of California
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ORDER NOT FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re:

JORGE ARMANDO RINCON TORRES,
Debtor.

ROSENDO GONZALEZ, Chapter 7
Trustee,

Plaintiff,

vs.

JORGE ARMANDO RINCON TORRES,
Defendant.

Case No. 2:15-bk-21044-RK

Chapter 7

Adv. No. 2:15-ap-01541-RK

**ORDER DENYING TRUSTEE'S
MOTION FOR DEFAULT
JUDGMENT, VACATING HEARING
ON MOTION AND CONTINUING
STATUS CONFERENCE**

Pending before the court in the above-captioned adversary proceeding is the motion of plaintiff Rosendo Gonzalez, Chapter 7 Trustee in this Chapter 7 bankruptcy case ("Trustee"), for default judgment on his claim under 11 U.S.C. § 727(a)(9) against Defendant Jorge Amando Rincon Torres ("Defendant"), the debtor in this bankruptcy case. ECF 11 and 12. Trustee is representing himself on the Motion. Defendant, whose default has been entered by the Clerk of Court in this adversary proceeding, did not file any opposition or response to the Motion.

1 On October 8, 2015, Plaintiff commenced this adversary proceeding by filing a
2 complaint objecting to Defendant's discharge pursuant to 11 U.S.C. § 727(a)(9), ECF 1.
3 Defendant did not file a response to Plaintiff's complaint. On November 30, 2015,
4 Plaintiff filed a request for the Clerk of Court to enter default under Local Bankruptcy Rule
5 7055-1(a), ECF 6, and default was entered by the Clerk against Defendant, ECF 9. On
6 January 26, 2016, Plaintiff filed the Motion and noticed it for hearing on February 16,
7 2016, ECF 11 and 12.

8 Having considered the Motion and the record otherwise before the court, the court
9 determines that oral argument is unnecessary, dispenses with oral argument, takes the
10 Motion under submission, vacates the hearing on the Motion set for February 16, 2016 at
11 2:30 p.m., continues the status conference in this matter on February 16, 2016 at 2:30
12 p.m. to April 19, 2016 at 1:30 p.m., and denies the Motion for the following reasons.

13 Under 11 U.S.C. § 727(a)(9), the court shall grant the debtor a discharge unless,
14 "the debtor has been granted a discharge under section 1228 or 1328 of this title . . . in a
15 case *commenced* within six years before the date of the filing of the petition"
16 (emphasis added). Nonetheless, Trustee in the Motion argues that Defendant is not
17 entitled to a discharge in this Chapter 7 bankruptcy case because "it has not been six (6)
18 years *since the February 6, 2013 discharge* of the Debtor's debts pursuant to Section
19 1328(a) of the Bankruptcy Code." Motion at 6 (emphasis added); see also, Complaint,
20 ECF 1 at 4, ¶¶ 16-18 ("16. In the Debtor's First Case, the Debtor received the discharge
21 of debts pursuant to Section 1328(a) of the Bankruptcy Code on February 6, 2013. 17.
22 The Debtor commenced this case on July 13, 2015. 18. As a result, the Debtor is not
23 entitled to a discharge of his debts under Section 727(a)(9) of the Bankruptcy Code,
24 since it has not been six (6) years since the February 6, 2013 discharge of the Debtor's
25 debts pursuant to Section 1328(a) of the Bankruptcy Code.").

26 In a prior bankruptcy case, Defendant had filed for relief under Chapter 13 of the
27 Bankruptcy Code, 11 U.S.C., on October 15, 2008. *In re Karina Rodriguez Macias and*
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1 *Jorge Amando Rincon*, Case No. 2:08-bk-27267-WB Chapter 13 (Bankr. C.D. Cal.,
2 petition filed on October 15, 2008). Defendant subsequently received a discharge in the
3 prior Chapter 13 bankruptcy case pursuant to 11 U.S.C. § 1328 on February 6, 2013.
4 Exhibit 1 to Motion, Discharge of Debtor after Completion of Chapter 13 Plan, *In re*
5 *Karina Rodriguez Macias and Jorge Amando Rincon*, Case No. 2:08-bk-27267-WB
6 Chapter 13 (Bankr. C.D. Cal., discharge entered on February 6, 2013). Afterwards,
7 Defendant commenced the instant Chapter 7 bankruptcy case on July 13, 2015 by filing
8 his petition for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. *In re Jorge*
9 *Armando Rincon Torres*, Case No. 2:15-bk-21044-RK Chapter 7 (Bankr. C.D. Cal.,
10 petition filed on July 13, 2015), ECF 1.

11 The court determines that because Defendant was only granted a discharge in a
12 Chapter 13 bankruptcy case commenced more than six years before the filing of this
13 Chapter 7 bankruptcy case, he is not ineligible for a discharge in this Chapter 7
14 bankruptcy case under 11 U.S.C. § 727(a)(9). Contrary to Trustee's argument that
15 Defendant is not eligible for a discharge in this case based on the date of entry of
16 discharge in the prior Chapter 13 bankruptcy case, the statutory six-year look back period
17 for discharge eligibility in a subsequent Chapter 7 bankruptcy case under 11 U.S.C. §
18 727(a)(9) in light of a discharge in a prior Chapter 13 bankruptcy case is based on when
19 the prior Chapter 13 bankruptcy case was commenced, not when the discharge was
20 entered in the prior case as argued by Trustee. Accordingly, the court determines that
21 under 11 U.S.C. § 727(a)(9), Defendant is still eligible to receive a discharge in this case
22 because he filed this Chapter 7 bankruptcy case more than six years since he
23 commenced his prior Chapter 13 bankruptcy case. Therefore, the court must reject
24 Trustee's argument which is based on a misreading of the statutory language of 11
25 U.S.C. § 727(a)(9) and must deny the Motion.

26 The court also observes that despite the entry of default by the Clerk, Trustee has
27 failed to show that Defendant has been properly served with the adversary complaint in
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1 compliance with Federal Rule of Civil Procedure 4(c)(1), made applicable to this
2 adversary proceeding through Federal Rule of Bankruptcy Procedure 7004. Federal
3 Rule of Civil Procedure 4(c)(1) requires a summons to be served with a copy of the
4 complaint. Trustee's proof of service for service of process filed with the court on
5 October 14, 2015, and titled on the docket as "Summons Service Executed," ECF 4,
6 attests that the summons and notice of status conference were served on Defendant on
7 October 14, 2015, but it does not state that a copy of the complaint was served on
8 Defendant. A copy of the complaint was attached to ECF 4, the proof of service, titled on
9 the docket as "Summons Service Executed," but there is nothing in the proof of service
10 that attests that a copy of the complaint was served on Defendant. It may be that the
11 proof of service may be amended to clarify that the complaint was served on Defendant
12 as an attachment to the Summons and Notice of Status Conference served on
13 Defendant, but this has not been done. Thus, without such clarification or other proof of
14 service of the complaint on Defendant at this time, Plaintiff's Motion must also be denied
15 on the alternative grounds of insufficient evidence of proper service of process on
16 Defendant.

17 Based on the foregoing, IT IS HEREBY ORDERED as follows:

- 18 1. Trustee's Motion for Default Judgment, ECF 11, is denied.
- 19 2. The hearing on Trustee's Motion for Default Judgment noticed for February 16,
20 2016 at 2:30 p.m. is vacated.
- 21 3. Because it appears to the court that Trustee does not have a viable claim
22 against Defendant under 11 U.S.C. § 727(a)(9) as discussed herein, the court
23 strongly suggests that Trustee consider filing and serving a notice of voluntary
24 dismissal pursuant to Federal Rule of Bankruptcy Procedure 7041 (with special
25 notice requirements for complaints objecting to discharge), also making
26 Federal Rule of Civil Procedure 41(a)(2) applicable to this adversary
27 proceeding.
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1 4. In light of the court's ruling on the Motion, the court determines that the status
2 conference set for February 16, 2016 at 2:30 p.m. should be continued in order
3 for Trustee to have adequate time to consider the ruling on the Motion and for
4 proper service and filing a notice of voluntary dismissal pursuant to Federal
5 Rule of Bankruptcy Procedure 7041. Accordingly, the status conference in this
6 adversary proceeding set for February 16, 2016 at 2:30 p.m. is continued to
7 April 19, 2016 at 1:30 p.m.

8 5. No appearances are required for the Motion and the status conference on
9 February 16, 2016.

10 IT IS SO ORDERED.

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23 Date: February 12, 2016



24 Robert Kwan
25 United States Bankruptcy Judge
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